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No. [redacted] 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,

v.

COLUMBIA BROADCASTING SYSTEM OF CALIFORNIA, INC.

On Petition for Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

D. M. PATRICK,
Attorney for Respondent.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 30-34) is reported in 108 F. (2d) 737.

JURISDICTION.

The decision of the Court of Appeals was entered on November 29, 1939 (R. 30). A motion for re-argument filed by the Commission was denied on January 2, 1940 (R. 48). The jurisdiction of this Court is invoked under Section

240(a) of the Judicial Code, as amended by the Act of February 13, 1925 and under Section 402(e) of the Communications Act of 1934.

QUESTION PRESENTED.

Whether a decision and order of the Federal Communications Commission denying an application for transfer of an existing radio station license to a new holder filed under and pursuant to Section 310 (b) of the Communications Act is appealable to the Court of Appeals for the District of Columbia under the provisions of Section 402(b) of that Act or whether such decision and order is subject to review only by a district court of three judges under the Urgent Deficiencies Act of October 22, 1913, as extended by Section 402(a) of the Communications Act.

STATUTE INVOLVED.

The pertinent provisions of the Communications Act of 1934 and of the Radio Act of 1927 are set out in the Appendix to the petition for certiorari.

STATEMENT.

This case commenced with the filing on August 8, 1936 of an application requesting the consent of the Federal Communications Commission to the transfer of the license to operate radio station KSFO from The Associated Broadcasters, Inc. (Respondent in No. 865 and referred to hereafter as "Associated") to Columbia Broadcasting System of California, Inc., the Respondent here. The application was filed under Section 310(b) of the Communications Act of 1934. Both Associated and Respondent executed the form of application prescribed by the Commission and both parties filed other extensive data bearing upon the contractural arrangements between the parties and the value and earnings of the property, all as required by the Commission's rules and regulations (R. 1-2).

Upon examination of the application and supporting documents (R. 8), the Commission designated the application for hearing upon issues specified by it (R. 2). On December 2, 1936, a hearing on the application was held before an examiner of the Commission who filed his report on April 6, 1937 recommending that the application be denied. Both Associated and Respondent filed exceptions to the report of the Examiner and oral argument on the exceptions was held before the broadcast division of the Commission on July 1, 1937 and again after the divisions of the Commission were abolished before the Commission *en banc* on January 13, 1938 (R. 2). On October 18, 1938, the Commission rendered its decision and order denying the application (R. 7-17).

On November 12, 1938, both Associated and Respondent filed separate appeals in the Court of Appeals for the District of Columbia pursuant to Section 402(b) of the Communications Act (R. 1-7). On December 14, 1938 the Commission filed motions to dismiss each appeal "on the ground that this Court is without jurisdiction to entertain the same" (R. 17). Upon Respondent's motion, the lower court entered an order holding the preparation and printing of the record in abeyance until the determination of the question of jurisdiction and on February 4, 1939 assigned Commission's motions to dismiss the appeals for oral argument (R. 28-29). Argument was had on the motions to dismiss and the decision of the court overruling the motions (Justice Stephens dissenting) was rendered November 29, 1939 (R. 30-34). On December 16, 1939 the Commission filed motions for re-argument in both appeals (R. 35-47) and on January 2, 1940 these motions were denied by the court without opinion (R. 48).

ARGUMENT.

The only question decided by the lower court was that it had jurisdiction to entertain and ultimately to determine, an appeal from a decision and order of the Commission denying an application for transfer of a radio station license

filed and prosecuted under Section 310(b) of the Communications Act. It is the contention of Petitioner that proceedings to review such a decision and order are governed by paragraph (a) rather than paragraph (b) of Section 402 of the Act and, therefore, that such proceedings should have been brought before a district court of three judges rather than before the Court of Appeals for the District of Columbia.

As reasons why certiorari should be granted, Petitioner urges: (1) that there are basic and fundamental differences between an application for a new radio station license and an application for the transfer of an existing radio station license to a new holder; that these differences extend not only to the manner of invoking the jurisdiction of the Commission, but to the procedure employed by the Commission in considering such applications and to the character of determination which the Commission makes in disposing of them; (2) that adherence to the decision of the lower court, which failed to observe these differences, would place a substantial and unwarranted administrative burden upon the Commission; (3) that these differences show an intention upon the part of Congress not to permit the same type of judicial review in the two classes of cases, an intention which is manifest both in the Act itself and in its legislative history, and (4) that Congress in enacting Section 402(b) of the Communications Act without in terms referring to transfer cases, has adopted the rule of an earlier decision of the Court of Appeals of the District of Columbia which held that that Court had no jurisdiction to entertain an appeal in such a case under Section 12 of the Radio Act. It is also urged that due to changes in the personnel of the lower court and the fact that one justice dissented from the decision rendered in the present case, the state of the law upon the subject is uncertain. We shall deal with these reasons in order of their statement.

I.

Neither the Act Nor Its Legislative History Gives Support to Petitioner's Contention that There Are Fundamental Differences Between Proceedings to Secure a New License and Proceedings to Secure the Transfer of an Outstanding License to a New Holder or in the Duty of the Commission With Respect to Such Proceedings.

Petitioner contends that because Congress has dealt in Sections 308 and 309 of the Act with applications for "license" for "renewal of license" and for "modification of license" with greater detail and particularity than it has dealt with transfer cases arising under Section 310(b) of the Act, that the latter type of case is basically and fundamentally different. Petitioner apparently admits that the applicant is entitled to be heard before denial in cases of applications for a new license or for modification or renewal of existing licenses because Section 309(a) expressly requires it but contends that since the procedural provisions of the Act (Section 308 and 309(a)) do not in terms refer to transfer cases, the Commission is at liberty to deny the same without hearing.

But the test suggested by Petitioner is illusory. The test to be applied is not the presence or absence of procedural detail in the statute with respect to a particular proceeding or the name attached to the initial step or pleading. The test is rather the inherent nature of the proceeding and its object, purposes and requirements, constitutional as well as statutory. Moreover, the procedure to be employed must be adapted to the consequences that are to follow and to the attack and review to which the order will be subject. (*Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294, 319.) As stated by this court upon numerous occasions, "we must not 'be misled by a name, but look to the substance and intent of the proceeding'". (*Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266, 277.)

As thus viewed, there is no basic or fundamental difference between a proceeding designed to secure a new license and one designed to secure a license then held by another and the Act gives no support to any such distinction as Petitioner attempts to draw. In either case, the question to be determined by the Commission is essentially the same and its duties and responsibilities are the same. Questions of allocation aside, it is the object and purpose of either type of proceeding to secure proper and qualified holders of the instruments of authorization which the Commission is empowered to grant. To this end, the Commission must consider either an applicant for a new license or one who desires to become the new holder of an existing license in the light of "his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel". (*Federal Communications Commission* v. *Sanders Brothers,* No. 499, decided March 25, 1940.) But the basic similarity in the two proceedings does not end here; it extends to the procedure to be employed and the character of determination to be made. In neither case is the Commission's power of determination absolute; in both cases it is limited and circumscribed by the statutory standard[1] imposed by Congress. (*Radio Commission* v. *Nelson Brothers, supra,* Page 285.)

It is fundamental that a finding of compliance or lack of compliance with a statutory standard in proceedings such as those contemplated by Section 310(b) involves more than executive discretion or an ordinary executive determination (*Morgan* v. *U. S.,* 298 U. S. 468, 479). The proceeding is adversary in the sense that applicants for such authority are in contest with the Government, acting through the Commission, concerning the taking by such applicants of steps which but for the restrictions imposed

[1] In view of the context and general purposes of the Act (Sections 1 and 301), no significance can be attached to the use of the term "public interest, convenience or necessity" as the statutory standard in Section 309(a) and Section 319 as distinguished from the term "public interest" in Section 310(b).

by Section 310(b) could unquestionably be taken. (*Morgan* v. *U. S.*, 304 U. S. 1, 20; *Federal Power Comm.* v. *Pacific Power Co.*, 307 U. S. 156, 159.) A determination of the character required by Section 310(b) is judicial or quasi-judicial in nature and parties to be affected thereby have the right to a "full hearing" with all that that term implies.[2] (*Morgan* v. *U. S.*, 298 U. S. 468, 480-481; *Morgan* v. *U. S.*, 304 U. S. 1, 19-20).

Nor is it conclusive on the question at hand that in one instance the Congress may expressly require a hearing and in another fail to do so. The requirement that hearings precede orders promulgated by a body with power "to ordain" and "that impinge upon legal rights" has its origin in constitutional requirements of due process. (*Norwegian Nitrogen Co.* v. *U. S., supra,* page 318; *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117, 123; *Bratton* v. *Chandler,* 260 U. S. 110, 112-115). The Act must be read in such manner as to extend the procedural requirements of notice and hearing specified in Section 309(a) to applications under Section 310(b) or impute to Congress an intention both unlawful and unjust. (*Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304-305; *U. S.* v. *Katz,* 271 U. S. 354, 357).

The decision of the lower court that "the Communications Act (Section 310(b)) as now phrased, contemplates an application, hearing, if necessary, and decision upon the basis of public interest, just as much in the case of an application for the transfer of an outstanding license as in the case of

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[2] In the first *Morgan case,* page 480, this Court said: " • • • The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safe-guard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument • • •".

an application for a proposed new station license" (R. 30) is manifestly correct. As thus construed, the requirements of the Act and the relationship of Sections 308, 309(a) and 310(b) conform to the test laid down by the decisions of this Court.[3]

Nor is there anything in the legislative history of Section 310(b) which supports Petitioner's contention that Congress intended to require the Commission to grant hearings upon proper notice to all applicants for new licenses, for renewal of such licenses, or for modification thereof and did not intend to confer upon applicants for transfer of licenses the same rights. As a matter of fact, recourse to legislative history compels an opposite conclusion and one which is consistent with the constitutionality of the Act as it relates to the subject under consideration.

Petitioner is correct in its recital of the facts concerning the legislative history of Section 310(b) in so far as that recital goes (Pet. pp. 9-10). Both the Senate and conference reports on the bill,[4] which later became the Communi-

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[3] In the case of *Yamataya* v. *Fisher*, 189 U. S., 86, 101, this Court in discussing the principles of statutory construction involved here, said: " * * * In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellant * * *".

[4] Senate Report No. 781, 73rd Congress, 2nd Session, stated (Page 7): "Section 310(b) is Section 12 of the Radio Act as modified by H. R. 7716, requiring the Commission to secure full information before giving its consent to the transfer of a license".

Conference Report No. 1918, 73rd Congress, 2nd Session, stated (p. 49): "Section 310(b) is substantially section 12 of the Radio Act modified as proposed by H. R. 7716. The section relates to transfer of radio licenses. As in H. R. 7716 the authority to approve or disapprove such transfers is extended to cover transfer of stock control in a licensee corporation. The present law is also modified to require the Commission to secure full information before reaching a decision on such transfers."

cations Act of 1934, did state in substance that Section 310(b) was adopted from Section 12 of the Radio Act of 1927, "as modified by H. R. 7716" which passed both houses of Congress but failed to become law for lack of Presidential approval. But Petitioner neglects to state all the pertinent facts.

H. R. 7716[5] proposed three changes in Section 12 of the Radio Act, as follows: (1) It extended the prohibition against the unauthorized assignment of licenses so as to include also the unauthorized transfer of control of licensee corporations; (2) it prescribed a statutory standard of compliance with the "public interest" as a guide to, and test for, Commission action in passing upon such cases; and (3) it specifically provided that the Commission hold hearings in all cases arising under Section 12 of the Radio Act as thus amended. When Section 310(b) was enacted, the Congress carried over into that section the first and second amendatory provisions of H. R. 7716 above referred to, but it dropped the requirement that the Commission hold hearings in all transfer and assignment cases. In lieu of this requirement, Congress inserted a provision in Section 310(b) requiring the Commission to secure "full information" before passing upon such cases.

The conclusion to be drawn from this legislative history of Section 310(b) is not that Congress intended the Commission to pass upon and determine all transfer applications without hearing as suggested by Petitioner, but rather that Congress intended the Commission to grant

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[5] Section 8 of H. R. 7716, 72nd Congress, 2nd Session, provided in part as follows: "The station license required hereby, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any company, corporation or association holding such license, to any person, firm, company, association, or corporation, unless the Commission shall after a hearing, decide that said transfer is in the public interest, and shall give its consent in writing."

hearings in all such cases where a hearing was necessary for the proper and efficient administration of the Act, or for the purpose of satisfying constitutional requirements of due process. This follows from: (1) statements in the reports to the effect that Section 310(b) of the Communications Act was Section 12 of the Radio Act, as amended by H. R. 7716, since H. R. 7716 specifically required a hearing in all cases; (2) the requirement that the Commission secure "full information" before passing upon such cases which implies that the conventional and usual method of accomplishing this result, namely, the conduct of hearings, will be employed; and (3) the fixing of a statutory standard as a limitation upon, and guide for, the exercise of the Commission's administrative discretion which is consistent only with a hearing before denial, as constitutional requirements will not otherwise be met.

The legislative history of Section 310(b), like a fair and impartial reading of that and related sections, confirms the accuracy of the lower court's decision that applications for transfer, like other applications specifically enumerated in Section 309 (a), cannot be denied without affording the applicants an opportunity for hearing.

II.

Petitioner's Contention that the Decision of the Lower Court Places an Unwarranted Administrative Burden Upon It Begs the Question and Ignores the Commission's Statutory Duty.

What has been said under the foregoing heading concerning the nature of the proceeding and determination contemplated by the terms and legislative history of Section 310(b), disposes of Petitioner's contention that the decision of the lower court will impose a substantial and unwarranted administrative burden upon it except to point out that the contention made is a *non sequitur*. The requirement that Congress grant hearings to interested par-

ties in cases under Section 310(b) arises out of the express and implied terms of that and related Sections of the Act rather than out of provisions of the Act determining in what tribunal that order, when made, can be judicially reviewed. Moreover, when dealing with the type of administrative proceeding where a full hearing is required, "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harrassing delay when that minimal requirement has been neglected or ignored" (*Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 305).

The contention thus advanced is also at variance with the administrative practice and experience of the Commission as shown by its records[6] and opposed to a representation made by the Commission to Congress in its most recent An-

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[6] While no official figures have been compiled and are available, an examination of the Commission's records shows that from the creation of the present Commission (July 11, 1934) to April 10, 1940, applications under Section 310(b) of the Act have been filed and disposed of by the Commission as follows:

Of the 260 applications for assignment of license which have been filed, 161 have been granted without hearing; 38 have been designated for hearing and granted (some on petition for reconsideration and without the actual conduct of a hearing); 5 have been designated for hearing and denied; 25 have been returned to the applicant before designation for hearing (at the request of the parties, because of the use of wrong form, etc.); and 31 have been returned to the applicant or dismissed after designation for hearing (at the request of the party, because of default or failure to comply with procedural requirements, etc.)

Of the 202 applications for transfer of control of licensee corporations which have been filed, 120 have been granted without hearing; 40 have been designated for hearing and granted (some without the actual conduct of a hearing as in assignment cases); 3 have been designated for hearing and denied; 26 have been returned before designation for hearing (at the request of the parties, because of the use of wrong form, etc.); and 13 have been returned or dismissed after designation for hearing (at the request of the party, because of default or failure to comply with procedural requirements, etc.)

nual Report.[7] It has been the uniform practice of the Commission, at least until recently, to handle all applications for assignment of license or transfer of control of licensee corporations in exactly the same manner in which the applications specifically enumerated in Section 309(a) were handled. A form of application is prescribed[8] and its use required.[9] If satisfied from an examination of the application that compliance with the statutory standard would result, the application is granted without hearing. If the Commission is not thus satisfied, the application is designated for hearing upon issues specified by the Commission (R. 8). If designated for hearing all procedural steps incident to the handling of other applications are employed, as in the present case (R. 2; 8; Fifth Annual Report (p. 42) "Hearings on Applications").

It is not only illogical but at variance with experience to contend that since more than 100 transfer and assignment cases were presented to the Commission in each of the years 1938 and 1939 "the decision below will thus require the

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[7] Fifth Annual Report of Federal Communications Commission of November 15, 1939, at pages 42-43:

> "Formal hearings were held on 140 applications involving requests for new stations and for changes in broadcast station facilities, 46 of which were decided and 94 were still pending at the close of the year. Hearings were held on 25 applications involving assignment of licenses and transfer of control of licensee corporations, 11 of which were decided and the remainder were still pending at the close of the year. *The majority of such applications were acted upon without the necessity of formal hearings* (italics ours). Hearings were also held on 18 renewal of license applications, 5 of which were decided. During the year the Commission heard oral argument in more than 100 broadcast cases, and it adopted formal decisions in more than 200 cases."

[8] See FCC Form No. 702 in use at the time of the filing of the application involved here (August 8, 1936) and FCC Form No. 314 in use since December 19, 1938.

[9] See Commission rules and regulations Section 103.18, approved December 18, 1935 and Section 1.364 in effect since August 1, 1939.

Commission to hold more than 100 hearings annually in addition to those which it now holds—a substantial administrative burden''' (Pet. p. 7). Certainly if past experience is any guide to future conduct, not all cases will be set for hearing. It is much more reasonable to assume that the experience reported in the Commission's Fifth Annual Report will be repeated when "the majority of such applications were acted upon without the necessity of formal hearings."

III.

Neither the Act Nor Its Legislative History Support the Contention that Congress Intended to Afford a Different Type of Review in Transfer Cases Than in Other Cases Arising Upon the Application of a Party.

It is plain from the terms of the Act itself that the decision and order in question is subject to judicial review in some tribunal. This follows from the fact that it is the type of administrative order which is subject to judicial review (*Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 143; *Federal Power Commission* v. *Pacific Power Co.*, 307 U. S. 156, 159) and from the further fact that under Section 402(a) of the Act, "any order of the Commission" with certain stated exceptions, is subject to review in the manner provided in the Urgent Deficiencies Act and all orders of the Commission excepted from the operations of Section 402(a) are, by Section 402(b), specifically made appealable to the Court of Appeals for the District of Columbia. Since Congress might have elected either method, the accuracy of the lower court's decision rests upon the construction to be given paragraphs (a) and (b) of Section 402, their relationship to each other and to the general scheme of the Act.

There is nothing in the Act to indicate that the words "application for * * * a radio station license" appearing in Section 402(a) as a limitation upon the jurisdiction of three-judge district courts and the words "an applicant

* * * for a radio station license" in Section 402(b) conferring jurisdiction upon the Court of Appeals for the District of Columbia do not include an application for the transfer of an existing license to a new holder as well as an application for a new license. The lower court decided that the language in question included the former as well as the latter type of application and this conclusion is borne out by the basic similarity between the two proceedings and by the legislative history of the provisions in question.

Senate Bill No. 3285 of the 73rd Congress, Second Session, with certain amendments made by the House of Representatives, became the Communications Act of 1934. In Senate report No. 781, Senator Dill, who was then Chairman of the Senate Committee on Interstate and Foreign Commerce, explained Section 402 and the policy of the Congress as expressed therein in providing two forums for judicial review of the Commission's decisions and orders as follows:

> (Page 9) "Where a licensee desires to appeal from orders of the Commission affecting his interest, but which he did not originate, he may file his appeal in the three-judge district court in the jurisdiction where he lives. In those cases where he has applied to the Commission for an order and desires to appeal from the Commission's action, he must come to Washington, D. C., to prosecute his appeal, just as he came to Washington to ask for the order.
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> * * * * *
>
> "Your Committee believes that this appeal section is eminently fair. In nearly all cases in which the Commission makes an order affecting a licensee which the licensee did not seek, the Commission must go to the district court having jurisdiction of such licensee. Where an applicant or a licensee comes to the District of Columbia and applies for an order, he must take his appeal in the courts of the District of Columbia."

House amendments to S. 3285, as passed by the Senate, made necessary the appointment of a conference commit-

tee. Congressman Rayburn, who was then Chairman of the House Committee on Interstate and Foreign Commerce, submitted a conference report (No. 1918) in which he further explained Section 402 of the Senate bill and the division of jurisdiction to review Commission decisions and orders provided for therein as follows (p. 49):

> "The Senate bill (Sec. 402), for the purposes of cases involving carriers, carries forward the existing method of review of orders of the Interstate Commerce Commission, and, in the main, for 'radio' cases carries forward the existing method of review of orders of the Federal Radio Commission; but in 'radio' cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification, and suspension matters, review is to be by the method applicable in the case of orders of the Interstate Commerce Commission. The House provision contains a similar provision as to cases involving carriers, but leaves the present Section 16 of the Radio Act of 1927, as amended, applicable in all radio cases. The substitute adopts the Senate provision."

Section 402 of the Senate bill (S. 3285) dealt with by Senator Dill in report No. 781 and by Congressman Rayburn in conference report No. 1918 became Section 402 of the Communications Act without further amendment. We therefore have not one, but two, responsible expressions of legislative intent dealing with the provisions in question. Both are to the same effect and both are consistent with a definite and clearly expressed legislative policy to the effect that applicants for instruments of authorization under Title III of the Act who desire to review adverse Commission decisions must do so in the courts of the District of Columbia while persons holding such instruments of authorization who are proceeded against by the Commission, will have the benefits, if any, which accrue from a suit brought in the district of their residence.

Authority for the transfer of a license, like other instruments of authorization which the Commission is empowered to grant under Title III of the Act, can be granted only upon the application of one who desires to secure such authority and can not be granted by the Commission upon its own motion.[10] It follows that if effect is to be given well-settled rules of statutory construction, decisions and orders of the Commission rendered in transfer cases are reviewable by appeal to the Court of Appeals for the District of Columbia under Section 402(b) of the Act and that that court correctly determined the question of its jurisdiction.

IV.

The Rule of the Pote Case Has Been Rejected Both Legislatively and Judicially and the Circumstances of Its Rejection Afford No Basis for Certiorari.

Much is made of the fact that in the case of *Pote* v. *Federal Radio Commission*, 67 F. 2d 509, decided by the Court of Appeals of the District of Columbia almost seven years ago, it was held that an applicant for transfer of a license under Section 12 of the Radio Act had no right of appeal to that court from a decision and order of the Radio Commission denying its application. Petitioner claims essential similarity between the provisions of Section 12 of the Radio Act and Section 310(b) of the Communications Act and seeks to invoke the doctrine of legislative ratification of the rule of the *Pote case* since Section 402(b) of the Communications Act, enacted after the decision in the *Pote case*, does not in terms refer to applications for transfer of license.

The opinion of the lower court effectively disposes of this contention. The basic differences between Sections 310(b) of the present Act and Section 12 of the Radio Act are noted and it is further pointed out that under the decisions of this Court "one decision construing an act does

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[10] Compare Sections 309, 310(b), 319 and 312 of the Act.

not approach the dignity of a well-settled interpretation" (R. 32). But there are additional reasons why the rule of legislative ratification can not apply.

Except for the existence of the *Pote* decision, at the time of the enactment of Section 402(b), all of the elements of legislative ratification are missing. Congress not only changed Section 12 of the Radio Act relating to the transfer of licenses but also changed those provisions of the Act (Section 16) relating to judicial review of the Commission's decisions and orders. Moreover, the changes made in those provisions of the law relating to the judicial review of the decisions and orders of the regulatory authority were made in such manner and pursuant to such a definite expression of intent (see pp. 14-15, *ante*) as to refute any suggestion of the ratification of a pre-existing rule, either judicial or legislative. Since the language of Section 402 of the Act is entirely consistent with the expression of intent found in the legislative journals, Petitioner's contention is effectively foreclosed.

Petitioner contends further that because of changes in the personnel of the lower court since the decision in the *Pote case* and further because one of the three judges who heard the present case dissented from the decision rendered, the state of the law on the subject is uncertain. This follows, according to Petitioner's contention from the fact, that the majority of the court of six judges has not concurred in the result reached. This contention ignores realities.

This Court is familiar with the fact that it is the practice of the Court of Appeals of the District of Columbia to sit as a court of three judges (*Thompson et al.* v. *Park Savings Bank*, 68 App. D. C. 272; 96 F. (2d) 544, certiorari denied, 305 U. S. 606) unless it determines otherwise. In view of the pronouncement of the majority of the court in the present case expressly overruling the *Pote case* in so far as it might be in conflict with the decision rendered, we submit that there can be no question concerning the state of

the law if the decision of the lower court is permitted to stand.

V.

The Petition Fails to Present Adequate Reasons for the Issuance of the Writ.

These is no similarity between this case and any other case which we have found in which this Court has granted certiorari at this stage of the proceedings merely for the purpose of resolving doubts concerning the jurisdiction of the lower court. Unlike the case of *Federal Power Commission* v. *Pacific Power Co., supra,* p. 156, no question of conflict of decision between Circuit Courts of Appeal is presented and again unlike that case, the question presented is not whether, *but where,* the decision and order in question can be judicially reviewed. In view of the already protracted character of the litigation[11] and the manifest correctness of the lower court's decision, the ends of justice will be better served by denial of the writ.

CONCLUSION.

The decision of the court below is correct and there is no conflict of decision. No adequate reason for certiorari is presented. The petition should be denied.

Respectfully submitted,

D. M. PATRICK,
Attorney for Respondent.

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[11] Respondent's application was filed with the Commission August 8, 1936 and the appeal to the lower court from the Commission's decision and order denying the application was taken November 12, 1938 (R. 1).

ACKNOWLEDGMENT OF SERVICE

(Executed on Original Copy)

Service of the foregoing brief for the respondent in opposition is hereby acknowledged and a copy received this .....day of April, 1940.

.....

FRANCIS BIDDLE,
Solicitor General of the United States.

.....

WILLIAM J. DEMPSEY,
General Counsel,
Federal Communications Commission.